165

(3)

No. 09-1360

In the Supreme Court of the United States

TOTES-ISOTONER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
REGINALD T. BLADES, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the provisions of the Harmonized Tariff Schedule of the United States at issue in this case, which impose higher rates of duty on imported "[m]en's" seamed leather gloves than on seamed leather gloves "[f]or other persons," violate the equal protection component of the Due Process Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 11, 12
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 14
Craig v. *Boren*, 429 U.S. 190 (1976) 6
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 10
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 6
Manufacturers Hanover Trust Co. v. *United States*, 775 F.2d 459 (2d Cir. 1985), cert. denied, 475 U.S. 1095 (1986) 7, 8
Personnel Adm'r v. *Feeney*, 442 U.S. 256 (1979) 7, 10
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1976) 10
Washington v. *Davis*, 426 U.S. 229 (1976) 10
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 10

Statute:

28 U.S.C. 1581(i) 4

Miscellaneous:

Harmonized Tariff Schedule of the United States, available at http://www.usitc.gov/tata/hts 3

Miscellaneous—Continued: Page

Subheading 4203.29.30 2
Subheading 4203.29.40 2
Subheading 4203.29.50 2

In the Supreme Court of the United States

No. 09-1360

TOTES-ISOTONER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-29a) is reported at 594 F.3d 1346. The opinion of the United States Court of International Trade (Pet. App. 49a-71a) is reported at 569 F. Supp. 2d 1315. The opinion and order of the CIT denying the parties' motions for reconsideration (Pet. App. 30a-48a) is reported at 580 F. Supp. 2d 1371.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2010. The petition for a writ of certiorari was filed on May 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Harmonized Tariff Schedule of the United States (HTSUS) classifies goods imported into the United States and establishes the import duties for each classification.[1] This case concerns the HTSUS provisions establishing applicable duties on imported seamed leather gloves. HTSUS Subheading 4203.29.30 provides for a duty rate of 14% *ad valorem* for "[m]en's" seamed leather gloves. Subheadings 4203.29.40 and 4203.29.50 provide for a duty rate of 12.6% *ad valorem* for seamed leather gloves, lined or unlined, "[f]or other persons." Pet. App. 4a-5a (quoting HTSUS § VII, Ch. 42).

2. Petitioner, a United States importer of men's seamed leather gloves, filed suit in the United States Court of International Trade (CIT) challenging the HTSUS provisions governing seamed leather gloves. Petitioner argued that, by imposing different import duty rates for men's gloves and gloves "[f]or other persons," the relevant HTSUS provisions "discriminate on the basis of gender or age" in violation of the equal protection component of the Due Process Clause. Compl. ¶ 1; see Pet. App. 5a. Petitioner sought to recover customs duties assessed against it under HTSUS Subheading 4203.29.30. Compl. ¶ 1.

The CIT dismissed petitioner's complaint. Pet. App. 49a-71a. The court rejected the government's threshold arguments that petitioner's claim presented a non-justiciable political question and that petitioner lacked standing. *Id.* at 51a-63a. The CIT concluded, however, that petitioner had failed to state a claim upon which relief could be granted because petitioner's allegations were

---

[1] The HTSUS is available at http://www.usitc.gov/tata/hts.

insufficient to give rise to an inference of intentional gender discrimination. *Id.* at 63a-70a.

While acknowledging that the tariff schedule "makes an express reference to gender," Pet. App. 69a, the CIT explained that "[t]o classify imports as men's gloves, or gloves 'for other persons' does not establish that they will be bought or used by men, or that men will necessarily pay the allegedly discriminatory tax," *id.* at 67a. In the absence of an allegation that the tariff classifications "impose a facially discriminatory tax," *id.* at 70a, the court concluded, petitioner was required to include "a factual allegation that demonstrates a governmental purpose to discriminate," *id.* at 65a; see *id.* at 70a. The CIT determined that "classification of goods as 'for' men" was insufficient to show such a purpose. *Ibid.*

Both parties filed motions for reconsideration, the government on jurisdictional grounds and petitioner on the merits. The CIT denied both motions. Pet. App. 30a-48a. The court rejected petitioner's argument that "the complaint's pleading of the existence of a gender-based classification suffices to establish an inference of unconstitutional discrimination." *Id.* at 41a. The CIT explained that "the court will only excuse the plaintiff's requirement to demonstrate either discriminatory intent or that the law at issue actually caused unconstitutional discrimination after the plaintiff has shown that the provision is facially discriminatory." *Id.* at 41a-42a. The CIT further explained that the HTSUS is not facially discriminatory, but "merely distinguishes between two similar products." *Id.* at 44a.

3. The court of appeals affirmed. Pet. App. 2a-29a. The court held that petitioner had third-party standing to pursue the equal protection rights of male glove purchasers, *id.* at 8a-11a, and that its claims were otherwise

justiciable.[2] On the merits, however, the court held that petitioner had failed to state a claim that the tariff classification unconstitutionally discriminates between "items of property of the 'same class.'" *Id.* at 15a. The court explained that "allegations of such discrimination are judged under the rational basis test." *Ibid.* The court concluded that petitioner had "failed to allege facts sufficient to show that men's and women's gloves are property of the same class" because those articles are "separate commodities, moving in different channels of trade and presenting different commercial issues with respect to domestic manufacturers." *Ibid.*

The court of appeals also rejected what it understood to be petitioner's primary argument: that the HTSUS facially discriminates on the basis of the gender of persons who use gloves. Pet. App. 17a-18a & n.6, 24a. The court framed the relevant question as "whether the allegation of disparate impact of the tariff provisions with respect to male glove users is sufficient to create a prima facie case of sex discrimination." *Id.* at 18a. In addressing that issue, the court explained that "disparate impact standing alone does not establish a violation of equal protection." *Id.* at 19a. The court acknowledged that in some contexts, such as jury selection, an allegation of disparate impact alone "may in fact be sufficient to make out a prima facie case of discrimination." *Id.* at 19a-20a. But the court concluded that, "in the area of taxation and tariffs, something more than disparate impact is required to establish a purpose to discrim-

---

[2] The court of appeals held that the CIT had jurisdiction under its residual jurisdiction provision, 28 U.S.C. 1581(i), Pet. App. 6a-8a, and that review was not barred by the political question doctrine, *id.* at 11a-13a.

inate for the purposes of pleading an equal protection violation." *Id.* at 23a.

The court of appeals explained that Congress's classification of goods for the imposition of tariffs "as a general matter is not concerned with the characteristics of the ultimate retail users of goods," but is rather "designed to promote particular trade policy objectives negotiated with other countries." Pet. App. 20a. The court of appeals concluded that, "[a]bsent a showing that Congress intended to discriminate against men in the tariff schedule," the court could not "simply assume the existence of such an unusual purpose from the mere fact of disparate impact." *Id.* at 22a. The court further explained that "[a] contrary ruling would call into question all taxes on items which are disproportionately consumed by any identifiable group." *Id.* at 23a. The court of appeals also concluded that the same reasoning "necessarily" applied to petitioner's claim of unconstitutional age discrimination, since such discrimination is "subject only to rational basis review." *Id.* at 25a.

Judge Prost filed a separate opinion concurring in the result. Pet. App. 25a-29a. Although Judge Prost objected to what she viewed as "the majority's treatment of trade law as an exception to this country's equal protection jurisprudence," *id.* at 25a, she agreed that petitioner's complaint was properly dismissed. Judge Prost would have held that the challenged tariff schedule "is not facially discriminatory" because "[i]t imposes a burden on importers, not gender- or age-based classes of people." *Id.* at 27a; see *id.* at 28a ("Much like tuxedos and evening gowns are different products, men's and women's gloves are different products."). Judge Prost further explained that petitioner had not alleged facts indicating that the differential tariff rates result in any

adverse impact on male glove users. *Id.* at 28a-29a. She noted in particular that petitioner had "confirmed at oral argument before [the court of appeals] that it does not allege that the cost of the higher tariff is passed on to consumers." *Id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 17-29) that the challenged HTSUS provisions, by imposing higher tariffs on men's seamed leather gloves than on seamed leather gloves "[f]or other persons," unconstitutionally discriminate on the basis of gender and age. Petitioner also argues (Pet. 30-35) that it has standing to press its equal-protection claim on its own behalf, rather than on behalf of male users of seamed leather gloves. Those contentions lack merit and do not warrant this Court's review.

1. Petitioner contends (Pet. 17-24) that the HTSUS provisions governing seamed leather gloves facially discriminate on the basis of gender and are therefore invalid unless they are "substantially related to achievement" of "important governmental objectives." *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). The court of appeals correctly rejected that contention, see Pet. App. 24a, and its disposition of the issue does not warrant further review.[3]

---

[3] Petitioner also contends (Pet. 17-21) that the HTSUS unconstitutionally discriminates on the basis of age. Unlike gender discrimination, however, laws that are alleged to discriminate on the basis of age are subject only to rational-basis review. See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000); see also Pet. App. 25a. The petition for a writ of certiorari makes no argument that Congress lacks a rational basis for imposing different duties on children's and adult gloves, and thus offers no reason for this Court to review the dismissal of petitioner's age-discrimination claim. See *ibid.*

a. Because "[c]lassifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination," this Court has held that gender-based classifications "require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 273 (1979). The HTSUS provisions at issue in this case, however, are not gender-based classifications. As the concurring judge explained, the HTSUS "distinguishes on the basis of products, not natural people." Pet. App. 27a-28a (Prost, J., concurring in the result). Although, as petitioner emphasizes, the HTSUS "refers to gender ('men's')," Pet. 20, it does so not to describe a class of people on the basis of their gender, but to describe a kind of seamed leather glove based on the principal use for which it is designed. See Pet. App. 44a (CIT explains that "the HTSUS is not facially discriminatory" but "merely distinguishes between two similar products"). Imposing different duties on gloves designed for use by men "does not constitute disparate treatment of actual men." *Id.* at 28a (Prost, J., concurring in the result).

b. Contrary to petitioner's contention (Pet. 21-24), the court of appeals' rejection of its gender-discrimination claim does not conflict with *Manufacturers Hanover Trust Co.* v. *United States*, 775 F.2d 459 (2d Cir. 1985), cert. denied, 475 U.S. 1095 (1986). In *Manufacturers Hanover Trust*, the Second Circuit concluded that the IRS's use of gender-based mortality tables to value reversionary interests of a decedent's estate was subject to heightened equal-protection scrutiny because "the value of the grantor's reversionary interest * * * is determined by calculations that treat similarly situ-

ated men and women differently." *Id.* at 462. In rejecting the argument that the challenged regulations did not discriminate on the basis of gender because they governed the taxation of estates rather than individuals, the court explained:

> The estate represents the legal interests of the decedent and the decedent's beneficiaries, who may be individual men or women. When an estate pays a tax, there is an obvious practical impact on the beneficiaries: the higher the tax, the less the estate has to distribute to the beneficiaries. There is also an impact on the decedent, since the higher the estate tax the less the decedent can benefit, through her estate, those she wishes to benefit. Estates and the laws governing them are a means of channeling effects upon individuals, and taxes on estates are just as capable, in principle, of discriminating against men or women as a tax on individuals.

Id. at 463.

In contrast to the gender-based mortality tables at issue in *Manufacturers Hanover Trust*, nothing in the HTSUS treats "similarly situated men and women differently." 775 F.2d at 463. Rather, the HTSUS simply mandates different treatment for classes of gloves that are similar in certain respects but different in others. And unlike the estates at issue in *Manufacturers Hanover Trust*, importers of seamed leather gloves do not "channel[]" the effects of a gender-based classification upon individual men and women, *ibid.*, since the application of the tariff schedule does not depend on the sex of

the gloves' purchasers. The decision below therefore does not conflict with *Manufacturers Hanover Trust*.[4]

2. Although petitioner did not clearly raise a disparate-impact argument in the courts below (see Pet. App. 18a n.6; *id.* at 29a (Prost, J., concurring in the result)), the court of appeals considered not only whether the HTSUS facially discriminates on the basis of gender, but also whether an allegation of disparate impact on male glove users would give rise to a cognizable claim of unconstitutional gender discrimination. The court concluded that such an allegation would not be sufficient to create an inference of intentional gender discrimination.

---

[4] Relying on the "channeling effects" language of *Manufacturers Hanover Trust*, petitioner argues that "import duties are clearly capable of channeling effects on people, as disparate impact on men who wear gloves is entailed from the statute." Pet. 22 n.15. As we explain below (see p. 13, *infra*), petitioner failed to allege facts suggesting that the challenged HTSUS provisions have actually caused such a disparate impact. And even if such an impact could be shown, that would not mean that the HTSUS itself facially discriminates on the basis of gender.

Petitioner also contends (Pet. 23) that the court of appeals' decision in this case conflicts with *Manufacturers Hanover Trust* because the court below "ruled that taxation must always be reviewed under the rational basis test, whereas the Second Circuit correctly recognized that intermediate scrutiny is the proper test for reviewing gender-based taxation." That argument reflects a misreading of the court of appeals' decision. The court did not hold that "taxation must always be reviewed under the rational basis test," Pet. 23, even if it involves facial gender discrimination; it instead held that rational-basis review applies to claims that a tax law unconstitutionally distinguishes between items of property of the same class, Pet. App. 15a. Nor did the court of appeals disagree with the proposition that "intermediate scrutiny is the proper test for reviewing gender-based taxation." Pet. 23. Rather, it rejected petitioner's argument that the HTSUS provisions establishing the rates of duty on seamed leather gloves are gender-based. See Pet. App. 24a.

Id. at 21a-24a. Petitioner contends (Pet. 24-29) that the court's conclusion "represent[s] a sharp departure from established equal protection jurisprudence." Pet. 25. That argument lacks merit and does not warrant further review.

a. As petitioner acknowledges (Pet. 24), "official action will not be held unconstitutional solely because it results in a * * * disproportionate impact" on persons of a particular race or sex. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1976). A facially neutral law with a "disproportionately adverse effect" on a prohibited basis "is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Feeney*, 442 U.S. at 272. To establish the requisite discriminatory purpose, the plaintiff must show that the relevant governmental official "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279.

As the court of appeals noted, "[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily" on one group than another. Pet. App. 19a (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). This Court has explained that, in "rare" cases, a "stark" pattern of disparate effects, "unexplainable on grounds other than race," may, standing alone, support a finding of discriminatory purpose. *Arlington Heights*, 429 U.S. at 266 (citing, *inter alia*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)); see *id.* at 266 n.13 (noting that this Court has applied that approach in

jury-selection cases). Ordinarily, however, "impact alone is not determinative." *Id.* at 266.

Unlike in *Yick Wo* or *Gomillion*, any disparate impact on male glove users resulting from the HTSUS provisions at issue here is easily explained on grounds other than intent to discriminate on the basis of gender. Men's gloves and women's gloves have long been treated as separate commodities. See Pet. App. 15a & n.5; see also *id.* at 21a-22a (noting that "it is quite possible, even likely, that the different tariff rates for men's and other gloves reflect the fact that such gloves are in fact different products, manufactured by different entities in different countries with differing impacts on domestic industry"); cf. *id.* at 28a (Prost, J., concurring in the result) ("Much like tuxedos and evening gowns are different products, men's and women's gloves are different products."). When Congress assigns different duty rates to different goods in its tariff schedules, it is generally concerned with "trade policy objectives negotiated with other countries," not "the characteristics of the ultimate retail users of goods." *Id.* at 20a. As the court below correctly observed, "[a]bsent a showing that Congress intended to discriminate against men in the tariff schedule," a court cannot "simply assume the existence of such an unusual purpose from the mere fact of disparate impact." *Id.* at 22a. And as the court also correctly noted, a contrary conclusion "would call into question all taxes on items which are disproportionately consumed by any identifiable group." *Id.* at 23a. In this context, an allegation of disparate impact alone does not establish a cognizable claim of intentional gender discrimination.

2. Petitioner argues (Pet. 24-29), that the court of appeals' decision conflicts with *Bray* v. *Alexandria*

Women's Health Clinic, 506 U.S. 263 (1993). Petitioner points in particular to this Court's observation in *Bray* that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Id.* at 270. In petitioner's view, "[i]t follows that a higher duty on gloves imported for men is not only a discriminatory duty on men for purposes of equal protection, but also a discriminatory duty on importers." Pet. 25. But as the court of appeals explained, "[m]en's gloves are hardly an irrational object of disfavor, and a tax on them creates no compelling inference that Congress intended to discriminate against men." Pet. App. 24a. Petitioner provides no reason to think that the imposition of higher import duties on men's seamed leather gloves than on other seamed leather gloves stands as "an irrational surrogate for opposition to" men. *Bray*, 506 U.S. at 270.

c. Focusing on the court of appeals' discussion of Congress's trade-policy motives in creating tariff classifications, petitioner also argues that "equal protection guarantees would be eviscerated if the government could defeat [petitioner's] claim simply by referring to the likelihood that a differentiation was motivated by protectionism, favoritism, and official policy." Pet. 27; see *ibid.* ("[O]therwise unobjectionable government goals can violate equal protection when they are, as here, furthered by opportunistic discrimination in the form of *ad valorem* exactions based facially on age or gender."). Contrary to petitioner's suggestion, however, the court of appeals did not refer to Congress's trade-policy objectives as a justification for explicit gender

discrimination. Rather, the court referred to those objectives as a plausible alternative explanation, other than intent to discriminate against male glove users, for its differential treatment of men's seamed leather gloves and seamed leather gloves "[f]or other persons." Pet. App. 20a-22a. Petitioner offers no reason to question that conclusion.

d. In any event, even if proof of a disparate impact in this context could give rise to an inference of intentional sex-based discrimination, petitioner could not prevail in this case because it neither clearly relied on a disparate-impact theory below, see Pet. App. 18a n.6; *id.* at 27a (Prost, J., concurring in the result), nor alleged facts that would tend to show a disparate impact on male glove users, *id.* at 29a (Prost, J., concurring in the result). As Judge Prost observed, petitioner's complaint "makes no connection between the impact of the tariff on importers and the impact on consumers." *Ibid.* In particular, petitioner "confirmed at oral argument before [the court of appeals] that it does not allege that the cost of the higher tariff is passed on to consumers." *Ibid.* Absent any basis for concluding that male glove users suffer concrete harm as a result of the challenged tariff classifications, this case provides no occasion for the Court to decide whether or under what circumstances proof of such disparate impact would suggest intent to discriminate.

3. Finally, petitioner contends (Pet. 30-35) that it has "first-party standing" to challenge the HTSUS. That claim does not warrant this Court's review. The court of appeals held that petitioner had Article III standing because it was required to pay the 14% tariff rather than the lower duty imposed on seamed leather gloves other than those for men. Pet. App. 9a. The

court further held that petitioner had third-party standing to assert the equal-protection rights of male glove users. *Ibid.*

Because petitioner is a corporation rather than a natural person, and because the challenged HTSUS provisions do not differentiate based on the sex of the importer even when the importer is an individual, petitioner could not plausibly contend that it has suffered discrimination based on its *own* gender. In any event, the court of appeals dismissed petitioners' constitutional challenge not for lack of standing, but for failure to state a claim. Petitioner offers no reason to think that the outcome of the case would have been different if the court of appeals had held that petitioner had first-party, rather than third-party, standing. This Court's review accordingly is not warranted. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
REGINALD T. BLADES, JR.
Attorneys

JULY 2010